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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES H. FISCHER,

Plaintiff,

v.

14 CV 1307 (PAE) (AJP)

STEPHEN T. FORREST, JR., et
al.,

Defendants.

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New York, N.Y.
January 13, 2017
9:45 a.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

CUOMO LLC

Attorneys for Plaintiff

BY: OSCAR MICHELEN

CLEMENTS BERNARD PLLC

Attorneys for Defendants

BY: SETH HUDSON

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1 THE COURT: Good morning. Let me first ask you to
2 fill me in on where you are in discovery and then we'll talk
3 about the motions. Mr. Michelen?

4 MR. MICHELEN: Judge, we've done some documentary --
5 we've done most of the documents exchanged, we have a -- we
6 deposed Shane Gebauer who was deposed both as an individual
7 defendant and as the initial corporate representative. We had
8 dates scheduled in January for the Forrest defendants, and
9 we're scheduling a date for Mr. Fischer's deposition.

10 The only issue that we had with respect to discovery
11 was that Mr. Hudson informed us that he does have documents
12 that are responsive to our requests, but invited us to come to
13 North Carolina to view them, and we would rather he put them on
14 a disc and send them to us rather than make us go to North
15 Carolina to view them.

16 Other than that, I would say we have been working
17 cooperatively to try to get through these depositions.
18 Certainly by the end of January I think we could have gotten
19 all of the remaining depositions done, and then there would be
20 some non-parties we would want to do after that.

21 THE COURT: All right. Mr. Hudson.

22 MR. HUDSON: I would agree with what Mr. Michelen
23 says. That's kind of where we stand with discovery. As with
24 respect to the documents, we are producing those in the
25 ordinary course. They involve some AR information and some

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1 invoices --

2 THE COURT: AR meaning?

3 MR. HUDSON: Accounts receivable. Excuse me. These
4 are documents that are -- they're not electronic, they're paper
5 documents, they are in numerous banker boxes, not organized by
6 any specific individual or entity. They are in a banker box as
7 per date and year, they're shrink wrapped, they're stuck in a
8 warehouse. The burden of my client going through all these
9 banker boxes and picking out the documents is great, and that's
10 why we're making every document in those banker boxes available
11 to the plaintiff.

12 THE COURT: What is it they purport to show?

13 MR. HUDSON: I think -- Mr. Michelen can correct me --
14 but I think they purport to show the orders from defendant for
15 the plaintiff's product, and also the shipment from the
16 plaintiff to the defendant of the product.

17 MR. MICHELEN: I would also ask them for prior
18 catalogs, advertising material.

19 THE COURT: One thing at a time.

20 MR. MICHELEN: Sorry.

21 THE COURT: Do you really want all of these documents,
22 regardless of location of production as opposed to, assuming
23 the company has it, a computerized summary or some other
24 summary when we're talking about the purchase of plaintiff's
25 products by the defendant, which frankly, I'm not sure why

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1 that's even relevant.

2 MR. MICHELEN: Yes, your Honor. I think you're right
3 that we can limit that scope based upon -- we can at least wait
4 until the deposition of the Forrests, who were the initial
5 owners of the company.

6 Initially, part of a claim was that they had claimed
7 we had had issues with shipment. I don't think that's as
8 relevant as it was initially. And I think that we would be
9 willing to stop any inquiry into that. I don't think that's
10 much of an issue anymore. So, I would be more than willing to
11 hold off on the production of those documents, the shipment
12 records.

13 The thing I also want to alert the Court is
14 Mr. Fischer lost his set of that documents due to Hurricane
15 Sandy. That's why he can't simply say here are my records.
16 That was the initial concern. But I don't think the defendants
17 are even contesting that there was an ongoing business
18 relationship when they distribute the plaintiff's product, so
19 we'll hold off until the depositions for that portion.

20 THE COURT: All right. So let's talk about the
21 motions. Let's do the motion to dismiss first and the transfer
22 motion second.

23 Mr. Hudson, it's your motion, so why don't you begin.

24 MR. HUDSON: Right.

25 THE COURT: We'll do one motion at a time, so limit

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1 yourself to the motion for partial dismissal.

2 MR. HUDSON: Yes, your Honor. Your Honor, I'll start
3 off with the counterfeit claim. I think that's the most
4 straightforward one. And for a trademark to be counterfeit, it
5 has to be identical or substantially indistinguishable. In
6 this case, the marks are not identical, the marks are not
7 substantially indistinguishable. We're dealing with a mark for
8 Bee-Quick, which is plaintiff's product, and the defendant's
9 product is Natural Honey Harvester. There is nothing identical
10 or substantially indistinguishable about those types of
11 products or those two trademarks.

12 And in this court and other courts, a good example is
13 the Louis Vuitton case where Louis Vuitton sued a company
14 because they were using a handbag that had Chouis Vuitton for
15 doll toys. They were using -- Louis Vuitton had an LV, Chouis
16 Vuitton had a CV, the Court held that was not counterfeit.

17 THE COURT: Hold that thought for one minute. Is
18 plaintiff challenging natural honey as a counterfeit mark or is
19 it because of the use of the Bee-Quick bottle in the ads, etc.?

20 MR. MICHELEN: Well, it's not that the term Natural
21 Honey Harvester itself is a counterfeit of the plaintiff's
22 mark. It's that the nature of the way it's marketed is going
23 to make a consumer initially believe --

24 THE COURT: How is that a counterfeit? You may have a
25 valid unasserted Lanham Act unfair competition or something

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1 claim. But, the pleadings are based on what you have pled.
2 How is this covered under the statute for counterfeiting?

3 MR. MICHELEN: Because as the complaint alleges, your
4 Honor, if I were to type in in my Google search Fischer's
5 Bee-Quick, I would get the Natural Honey Harvester page at that
6 particular time, because in the URL they had Fischer's
7 Bee-Quick. So I would see Fischer's Bee-Quick on the
8 defendant's home page. And then I would see their product
9 using the exact same slogans.

10 THE COURT: Which is the counterfeit?

11 MR. MICHELEN: And I would say that is counterfeiting.
12 To have your home page with my product's name on it so when a
13 consumer would be initially confused to believe that this is
14 the same product. It's made worse by them stealing our
15 copyrighted and trademarked language, certainly, and it was
16 made even worse when there was the picture of Fisher's
17 Bee-Quick on there, but that's counterfeiting when you're going
18 to make a consumer believe.

19 THE COURT: What's your best case of all the cases
20 you've cited that the URL is what makes this a counterfeit?

21 MR. MICHELEN: There's never been -- we didn't find
22 any case, Judge. I didn't find any case that has a URL leading
23 to that page. This is a very unique set of facts, but it falls
24 in line with all the other -- the Victoria Secrets case which
25 was a Third Circuit case that we cite, 237 F.3d 198, and it is

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1 in line with the --

2 THE COURT: All right. What is it you're citing the
3 Victoria Secret case for?

4 MR. MICHELEN: Just that the use of the mark in that
5 fashion is likely to lead consumers to believe it is the same.

6 THE COURT: Was Victoria Secret a counterfeiting case
7 or a trademark or unfair competition case?

8 MR. MICHELEN: It was a counterfeiting claim. And it
9 set forth the elements, if you will, of a counterfeiting claim
10 and we do argue that --

11 THE COURT: I'm asking what the holding of the case
12 was.

13 MR. MICHELEN: Again, the only cite we use it for,
14 Judge, is if it is going to initially confuse the consumer by
15 using a trademarks, it can also be a counterfeiting claim as
16 well as a trademark case. And I think --

17 THE COURT: Is there a reason you didn't bring a
18 trademark --

19 MR. MICHELEN: I think the amended complaint makes out
20 a general trademark allegation.

21 THE COURT: Which paragraph or which section? Because
22 you all have approached this as, and let's use the complaint
23 in --

24 MR. MICHELEN: If you look in the third amended
25 complaint, which I think is exhibit --

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1 THE COURT: I've got it.

2 MR. MICHELEN: Paragraph 121 through 129.

3 THE COURT: I know. But when you read the actual
4 claims, starting with the 11th complaint on page 28, paragraph
5 140, heading use of a counterfeit mark in commerce. Then the
6 12th complaint, use of a counterfeit mark in commerce. 13th
7 complaint, use of a counterfeit mark in commerce website URL.
8 14th complaint, use of a counterfeit mark in commerce second
9 URL.

10 Where is there a plain vanilla trademark case?

11 MR. MICHELEN: Yeah, I don't see that in that
12 language.

13 THE COURT: Okay. Let me go back to Mr. Hudson on
14 this.

15 MR. HUDSON: Your Honor, the standard is how an
16 ordinary customer would look at the two products. Ordinary
17 customer look at one product and see Bee-Quick or look at Honey
18 Natural Harvester. They're not the same.

19 THE COURT: Move on to any other claims.

20 MR. HUDSON: Yes, your Honor. The next claims are the
21 counterfeit claims and the right of publicity claims. As the
22 Court is aware a counterfeit claim --

23 THE COURT: Counterfeit or copyright?

24 MR. HUDSON: Copyright claim has a three-year statute
25 of limitations and the right of publicity has a one-year

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1 statute of limitations.

2 THE COURT: Take them separately.

3 MR. HUDSON: Okay. Let's start off with the
4 copyright. In the complaint, Mr. Fischer makes clear that he
5 became aware of the alleged copyright infringement in March of
6 2011. He filed his complaint naming Mr. Gebauer in February 3
7 of 2015. And then on December 28 of 2015, he named Brushy
8 Mountain Bee Farm. They're well after the three-year statute
9 of limitations had run in this case.

10 Plaintiffs make the argument about that there is
11 republication. I don't think there is any allegations of
12 republication in the complaints. But, in all honesty --

13 THE COURT: Don't they say that some subsequent online
14 catalog going through at least 2014 used the language, in which
15 case they're timely?

16 MR. HUDSON: They make that allegation, your Honor,
17 but --

18 THE COURT: This is a motion to dismiss, not a motion
19 for summary judgment. Do you really wish to pursue the statute
20 of limitations on the copyright claim? The third amended
21 complaints may not be the most artfully drafted.

22 MR. HUDSON: At the very least, your Honor, I think
23 that the copyright claims prior to December 28, 2012, for
24 Brushy Mountain and prior to February 3, 2012, for Gebauer
25 should be dismissed.

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1 THE COURT: Let me ask the plaintiff if they agree.
2 Let me put it this way. I know you're going to make an
3 argument about relation back. Holding that, if there is no
4 relation back, do you agree that the claims prior to three
5 years before each complaint are barred by the statute of
6 limitations?

7 MR. MICHELEN: Yes.

8 THE COURT: Then you're the movant so to speak on the
9 relation back.

10 MR. MICHELEN: I think it is very clear that when the
11 pro se plaintiff filed his initial complaints, he was unaware
12 of Mr. Gebauer's role and control in the company.

13 THE COURT: Let me ask the question. He was certainly
14 aware that Brushy Mountain was the corporate entity. He had a
15 contract.

16 MR. MICHELEN: You're correct, your Honor, and he made
17 a decision --

18 THE COURT: Are you dropping the relation back
19 argument as to Brushy?

20 MR. MICHELEN: No, because I think that the relevant
21 argument is whether the corporation is prejudiced by being
22 brought in at this time.

23 THE COURT: Isn't the threshold question whether
24 Mr. Fischer and you, when you came in the picture, but Fischer
25 as a joint entity there, made a mistake? If he made a mistake

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1 of fact, then the issue is should the new defendant have known
2 there was a mistake. À la that cruise ship case that everybody
3 has cited.

4 MR. MICHELEN: Correct. That's where we were going,
5 Judge, and here the corporate defendant, by virtue of its
6 principals being named and knowing the relationship with the
7 plaintiff, had to have known that the corporation was just left
8 off and should have been added.

9 THE COURT: Except for the fact that Mr. Fischer was
10 very candid and stated in I believe it was the first or second
11 amended complaint that he purposely didn't sue the corporation
12 because he didn't want non-liable employees, etc., to suffer.
13 That seems to me a strategic choice, not a mistake.

14 MR. MICHELEN: It may be a mistake in law.

15 THE COURT: There is no such thing as a mistake of law
16 in the case, it is always a mistake of fact, for the relation
17 back doctrine.

18 MR. MICHELEN: I understand that. All I can ask the
19 Court is to consider that he was unrepresented at that time,
20 and that when the third amended complaint was filed by us --

21 THE COURT: He was represented at the time in the
22 second amended complaint. Right?

23 MR. MICHELEN: No, he was not, your Honor. He was
24 only represented at the time of the third amended complaint.

25 THE COURT: Is there any case that says under Rule 15

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1 for relation back, despite the typical sympathy and leeway
2 given to a pro se, that a pro se who intentionally doesn't
3 serve and name a defendant, just because he's pro se, gets
4 relation back?

5 MR. MICHELEN: Not that I am aware of, Judge.

6 THE COURT: So why should I allow relation back as to
7 Brushy?

8 MR. MICHELEN: Again, I think here only because of the
9 lack of prejudice to the defendant. The fact that the
10 principals are named.

11 THE COURT: That's not the standard.

12 MR. MICHELEN: That's all I can argue at this point.

13 THE COURT: I'm not asking you to fall on your sword.
14 And you were in the midst of arguing on Gebauer when I moved
15 you to Brushy.

16 MR. MICHELEN: Gebauer, certainly, Judge. Plaintiff
17 was unaware of his role, as we were saying, and he was aware of
18 the nature of the allegations, all of the relevant facts. He
19 suffers no prejudice by having this relate back to him. He was
20 the first corporate representative that was designated to be
21 deposed. He certainly is familiar with all the facts and
22 circumstances of the allegations, and was so at the time that
23 the complaint was even filed against the Forrests. So relation
24 back I would say applies to him.

25 THE COURT: As far as back as April 2011 Mr. Fischer

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1 knew that Gebauer was the general manager of Brushy Mountain.
2 Gebauer is the one who wrote a letter saying in April saying
3 you don't have a claim against us, whatever, and signed it with
4 the title general manager.

5 MR. MICHELEN: General manager might not -- I don't
6 think is sufficient to necessarily alert him he was a corporate
7 shareholder, that he was a principal in the company, and that
8 he had control over the intellectual property decisions of the
9 company. It might have been a hint at first.

10 THE COURT: Well, isn't the standard inquiry notice?

11 MR. MICHELEN: Well, that Mr. Fischer should have made
12 a further inquiry at that time. But at that time he also
13 already had the action pending. So he thought that discovery,
14 you know --

15 THE COURT: Where is there a case saying where you
16 know somebody has a role, you may not know how full the role
17 is, but your inquiry notice, which you otherwise would be on,
18 stops just because you've got a pending lawsuit against another
19 defendant?

20 MR. MICHELEN: Well, at that time, Judge, if you
21 recall, Judge, from the history of the pleadings, Mr. Fischer
22 had just filed the second amended also and then had retained
23 counsel. And then we brought Mr. Gebauer. It was a very short
24 lapse there between the notice and the ability for him to
25 inquire.

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1 THE COURT: When was the second amended complaint? I
2 think that's a lot later than 2011.

3 MR. MICHELEN: I thought it was 2012, Judge.

4 MR. HUDSON: Your Honor, if this helps, the amended
5 complaint filed naming Shane Gebauer was November 3, 2015.
6 Second amended complaint alleging Ms. Forrest, May 27, 2014.

7 MR. MICHELEN: It was '14, Judge.

8 THE COURT: Three years after he knew.

9 MR. MICHELEN: It is.

10 THE COURT: Finally, the New York right of publicity
11 claim.

12 MR. HUDSON: Your Honor, as I said earlier, right of
13 publicity claim is one year. Mr. Fischer has alleged in his
14 complaint that the URLs using his name are what constituted the
15 right of publicity claim or give rise to the right of publicity
16 claim. He said he learned about these in March 2011. He also
17 sent a cease and desist letter, this is what he alleges in his
18 complaint, he sent a cease and desist letter on April 5, 2011
19 to my clients alleging right of publicity. And again, he
20 didn't bring the original lawsuit until February 27, 2014. He
21 added, as I said earlier, he added Mrs. Forrest in May 27,
22 2014. Your Honor, I'm just giving you the dates for the 1304
23 case. There is a 1307 case.

24 THE COURT: They're roughly parallel.

25 MR. HUDSON: Right, yes, your Honor. February 3, 2015

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1 was naming Gebauer and December 28, 2015 named Brushy Mountain.

2 THE COURT: All right. Mr. Michelen.

3 MR. MICHELEN: I think the arguments are the same with
4 respect to the republication and the same with respect to
5 relation --

6 THE COURT: Except there is no allegation in the
7 complaint of a republication. If anything, the allegation is
8 that the use of his name was "continuous."

9 MR. MICHELEN: And I think that it also shows the
10 dates that it was continuous through the issuance of the
11 other --

12 THE COURT: But the difference between the New York
13 case law and right of publicity and the copyright law is that
14 under New York law, there has to be a republication, not just
15 the continued use. Which the continued use for the copyright
16 claim gives you a claim for that part of it that's within the
17 statute of limitations look back, but not before. And the New
18 York right of publicity they look at a republication. So if
19 the original publication remains out there, and no
20 republication, then the statute of limitations cuts off your
21 rights.

22 MR. MICHELEN: I think our allegation, your Honor, is
23 that they annually published a new catalog every year --

24 THE COURT: Except that's not in the complaint.

25 MR. MICHELEN: Well, it is in the complaint, Judge, in

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1 the sense that the republication -- I'm sorry, the right of
2 publicity incorporates the allegations before that, and I think
3 it is fairly sets out --

4 THE COURT: Tell me which paragraph says that the
5 catalog has Mr. Fischer's name.

6 MR. MICHELEN: That the catalog has Mr. Fischer's --

7 THE COURT: The right of publicity is that the URLs on
8 the website include Fischer's Bee-Quick.

9 MR. MICHELEN: Correct.

10 THE COURT: The catalog talks about selling the
11 product and it doesn't talk about Mr. Fischer's name.

12 MR. MICHELEN: Right. But the catalog has the photos,
13 Judge that show Mr. Fischer's name on the product.

14 THE COURT: This is a motion to dismiss. Whatever the
15 facts may be, if they're not adequately alleged --

16 MR. MICHELEN: I don't know that the paragraph, Judge,
17 in the portions that talks about civil rights specifically says
18 it.

19 What I was arguing is the paragraphs earlier in the
20 complaint as well as the exhibits to the complaint show that
21 the photographs containing Mr. Fischer's names was included.
22 That was the trademark -- that was the copyright as well as the
23 trademark allegations. Show that Mr. Fischer's Bee-Quick
24 bottle and the use of the plaintiff's name in that and that
25 that was published every year in the catalog, but not the URL.

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1 THE COURT: I understand. However, it does not appear
2 that -- and I'm looking, for example, at paragraph 52, 51, 52,
3 of the third amended complaint in 14 CV 1304 where you talk
4 about product web pages. I assume that's the catalog. But the
5 last one you've got is 2010. That doesn't get you anywhere
6 close. And then I guess paragraph 56 and thereabouts 57, 58,
7 gives you the 2011, either website or catalog, I don't see
8 anything thereafter. So, help me out.

9 MR. MICHELEN: No, there is nothing there, Judge, in
10 the complaint specifically that says that, other than we show
11 the annual republication of the print catalogs.

12 THE COURT: Where? That's what I'm asking.

13 MR. MICHELEN: In the exhibits to the complaint.
14 Exhibits 20, 23A and 23B show the republications annually. The
15 downloadable --

16 THE COURT: Slow down. 23, 23A?

17 MR. MICHELEN: Exhibit 20, 23A and 23B.

18 THE COURT: Give me a minute for my clerks to try to
19 pull that out. I should also note for whatever it's worth that
20 you never attached your exhibits to the filed copy of the third
21 amended complaint. It is only in the second amended complaint.

22 MR. MICHELEN: I apologize, I didn't realize that
23 error. I can correct that this afternoon when I get back to
24 the office. I think they are the same. That was never brought
25 to my attention previously, Judge. I apologize for that,

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1 Judge.

2 THE COURT: Unfortunately, I don't think this helps
3 you. Because the last catalog -- well, let's go through it.
4 Exhibit 20 shows a 2010 authorized use that says Fischer's
5 Bee-Quick. Then it shows a 2011 infringement and a 2012
6 infringement, none of which mention Mr. Fischer's name.
7 Correct?

8 MR. MICHELEN: Yes.

9 THE COURT: So, there's no proof there that his name
10 was used. Similarly, the 2013 and 2014 infringement may have
11 your copyrighted language, spouse making sleep in the garage,
12 etc., but the only product named, the only product picture is
13 Natural Honey Harvester, with no reference to Mr. Fischer.
14 Agreed --

15 MR. MICHELEN: Other than in the URL.

16 THE COURT: But you don't give the URL.

17 MR. MICHELEN: It's not in that exhibit, yes.

18 THE COURT: Correct. Then let's turn to 23A and B,
19 all of which is just a list of catalogs, PDF format, and all it
20 tells me substantively about it, you didn't attach the
21 catalogs, you didn't say "and they include a URL," all it says
22 is from 2011 to 2014, that they removed the CMI, copyright
23 management information. Again, no allegation that
24 Mr. Fischer's name is included.

25 MR. MICHELEN: Well, during that time the name would

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1 only have been in the URL because --

2 THE COURT: Okay. But that's not alleged. And you
3 live or die by the third amended complaint, in what is actually
4 fair game in the third amended complaint.

5 So, let me tell you what the Court's ruling is and
6 will be with an opinion to follow today or early next week, and
7 I'll do it in the same order that you all have discussed it.
8 The counterfeiting claim will be dismissed because this is not
9 a counterfeit. It is perhaps the bait and switch that you
10 argue, but it is not a counterfeit, as the case law and statute
11 uses the term trademark counterfeit. Even the URL is not a
12 counterfeit. Again, it may be unfair competition, it may be a
13 trademark infringement, it is not a counterfeit because it is
14 the actual mark. It is not like saying a Rolex instead of a
15 Rolax, Polarad instead of Polaroid. Any of those types of
16 things. It is either the actual mark when they showed the
17 picture of Fischer's Bee-Quick or even a URL saying Fischer's
18 Bee-Quick, but natural honey and Bee-Quick are not anywhere,
19 they are not even infringing in a trademark sense. So, those
20 claims are all going to be dismissed.

21 As to the copyright claims, they survive for the
22 three-year lookback period only. So anything prior to three
23 years before the filing of the complaints, each complaint, is
24 dismissed. And the Court finds that there is no 15(c) lookback
25 because there was no mistake made here. This is not like the

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1 Costa Cruise Line where they named Costa A when they should
2 have named Costa B. This is one where Mr. Fischer named the
3 Forrests, he learned about Mr. Gebauer in 2011, but didn't sue
4 Gebauer until 2015. And certainly he knew about Brushy
5 Mountain from day one, and made a choice not to sue them.

6 Indeed, in ruling on the Fischer's original motion,
7 Judge Engelmayer made a comment that, and I don't have the
8 exact words in front of me and I'm not going to take the time
9 to look at it, but essentially he said, you know, a weird
10 strategic choice, or a questionable strategic choice, but one
11 that Mr. Fischer, as the master of his own pleadings, is
12 entitled to make. So that takes care of the copyright claim.

13 With respect to the right of publicity claim, because
14 even reading the extra exhibits and extra paragraphs about the
15 copyright violation into the right of publicity claim, there is
16 no allegation of any republication as opposed to continuous use
17 of Mr. Fischer's name in the URLs or in using a picture of his
18 product. Even if the picture and the product could somehow
19 violate a right of publicity, which it probably can't, but
20 certainly on the URL it is alleged to be a continuous use, and
21 therefore, does not reopen the one-year statute of limitations.
22 And all of the complaints, including the original, were well
23 past the one-year period.

24 So, in light of that, I guess the first question for
25 the defendant in particular is do you still wish to pursue the

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1 transfer motion or do you wish to withdraw it?

2 MR. HUDSON: Your Honor, especially how we've ordered
3 the motions, we'll withdraw the transfer motion.

4 THE COURT: So you are amenable to the case staying
5 here, even though it may mean that, first of all, your
6 defendant witnesses will have to travel up here for trial, and
7 secondly, that your non-party witnesses may or may not show up?

8 MR. HUDSON: Right, yes, your Honor.

9 THE COURT: Any objection to that from the plaintiff?

10 MR. MICHELEN: None, your Honor. Thank you.

11 THE COURT: All right. So, next question. Obviously
12 you have the right on the motion to dismiss to file objections
13 to Judge Engelmayer or alternatively, with or without a
14 carve-out for that purpose, the parties have the option
15 pursuant to 28 U.S. Code Section 636(c) to have the case in
16 front of me for all purposes with the same direct appeal rights
17 to the Second Circuit that you would have after a ruling by
18 Judge Engelmayer. And there is a jury demand in the third
19 amended complaint, so there would be the same rights to jury
20 trial and the same people would be brought in by the clerk's
21 office for jury selection, whether that selection and trial is
22 going to be in front of Judge Engelmayer or me.

23 Are you all in a position to make a decision on that
24 now or do you want to sleep on it?

25 MR. MICHELEN: I would need time to confer with my

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1 client, Judge.

2 MR. HUDSON: Same here, your Honor.

3 THE COURT: Okay. So what are our next steps? You
4 have a January 31 discovery cutoff period. It looks like you
5 are in the process of meeting it.

6 MR. HUDSON: Can I address that, your Honor?

7 THE COURT: Sure.

8 MR. HUDSON: I should have thought about this more and
9 I don't know -- I know Mr. Michelen and I have talked about it.
10 Would it be possible to extend that at least a month or two?
11 My client just had knee surgery, and so we're not running up --

12 THE COURT: Which client?

13 MR. HUDSON: Excuse me. Steve Forrest had knee
14 surgery and I believe Mr. Fischer's wife is having surgery next
15 week.

16 MR. MICHELEN: Judge, Mr. Fischer's wife is ill. But
17 I believe we can certainly at least do Mr. Fischer by the 31st
18 because he has more issues than his wife's illness into
19 February. I have no problem with extending the time to
20 complete the defendants, but I'd like to keep a date set for
21 Mr. Fischer.

22 THE COURT: I'm certainly not inclined to give a
23 lengthy extension. This is for various reasons, mostly having
24 to do with Mr. Fischer's original status as a pro se, and
25 various motions to dismiss which lead us to where we are today,

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1 and the fact that you have had several extensions in front of
2 my friend Judge Pitman, the last of which was fairly recently,
3 to wit, well, in October getting you to the end of January.
4 Other than the fact that these motions were hanging over your
5 heads, I'm not adverse to giving you a week or two into
6 February if that will make it easier. And if Mr. Forrest can't
7 travel and needs to be deposed in North Carolina, you all
8 should work something out with respect to that.

9 So how about February 15.

10 MR. HUDSON: That works for me. Thank you.

11 MR. MICHELEN: Sure, that's fine, your Honor.

12 THE COURT: Are there any other discovery issues?

13 Mr. Michelen started mentioning some catalogs he wants from the
14 defendant.

15 MR. MICHELEN: We got some of the catalogs directly
16 through the printer who printed the catalogs, I don't recall
17 whether Mr. Hudson gave us the name of the other printer for
18 the other years. We can get them directly from the catalog
19 printer.

20 THE COURT: These are paper catalogs?

21 MR. HUDSON: Yes. The issue is they've asked for the
22 entire catalog which is a bound catalog, someone's going to
23 have to manually sit there and go through every page, and I
24 don't think every page of the catalog is relevant in this case.

25 THE COURT: The issue is you have the catalog, but you

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1 only have one and it's big.

2 MR. HUDSON: Right, your Honor.

3 THE COURT: So why don't you just Xerox the cover and
4 whatever page has Bee-Quick or Natural Harvester.

5 MR. HUDSON: We can do that.

6 MR. MICHELEN: That's perfectly acceptable to us,
7 Judge.

8 THE COURT: Get that done quickly.

9 MR. HUDSON: The only discovery issue that the
10 defendants have is we had a discovery hearing back -- it was
11 the Friday before Memorial Day, and during that hearing the
12 plaintiff agreed to supplement numerous discovery and to also
13 provide some of the documents that were referenced in a zip
14 file, and that discovery we still haven't gotten that yet.

15 MR. MICHELEN: I thought that all the documents have
16 been provided, but the issue was they wanted us to better
17 categorize where those documents matched up to the discovery
18 demands. I don't think there is actual documents that are
19 outstanding as opposed to they want the response better
20 identified, and I said we'd do that in advance of Mr. Fischer's
21 deposition.

22 THE COURT: So how soon can you do it?

23 MR. MICHELEN: Perhaps the 23rd of January.

24 MR. HUDSON: Yes, your Honor. That's not the only
25 issue. There is a zip file that's referenced in that

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1 discovery, and I can shoot Mr. Michelen an e-mail about that
2 zip file.

3 MR. MICHELEN: Yes.

4 MR. HUDSON: But there is numerous other written
5 discovery responses they were going to clarify, like I believe
6 it was our third request or our third set of interrogatories, I
7 think they answered one and everything else was see above, see
8 above, see above, and those --

9 THE COURT: What was the question or questions?

10 MR. HUDSON: I'm sorry, your Honor, I can't even --

11 MR. MICHELEN: That's not a problem, Judge. We'll
12 clarify. I wasn't aware he didn't receive the zip file.
13 That's not a problem, we can get that to him next week.

14 THE COURT: Fix everything by the 23rd.

15 MR. MICHELEN: Thank you.

16 THE COURT: Where are we going after the close of
17 discovery? Is there going to be a summary judgment motion
18 and/or are you ready to go to trial, subject to a settlement
19 issue which I'll raise after we talk?

20 MR. HUDSON: As for defendants, we'll make a summary
21 judgment motion.

22 THE COURT: What have you got to move on that the
23 facts are undisputed on that isn't taken care of by the motion
24 to dismiss?

25 MR. HUDSON: We haven't taken the plaintiff's

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1 deposition yet, but I am assuming. It is all contingent on
2 what facts come out in that deposition.

3 THE COURT: What facts would you need to have a
4 summary judgment motion?

5 MR. HUDSON: It's kind of asking me to lay out my hand
6 a little bit.

7 THE COURT: Let's put it this way. We can defer it,
8 but whether because of Judge Engelmayer's rules or even if he
9 doesn't require it, having just spent a lot of time dealing
10 with your motion to dismiss, which is likely to be virtually
11 the same as any summary judgment motion, and you knocked out
12 two groups of claims, so what's left is the copyright claims
13 and some other state law claims.

14 MR. MICHELEN: And the DMCA claims, right.

15 THE COURT: That's part of the copyright.

16 MR. MICHELEN: Yes.

17 THE COURT: So I'm not quite sure that there is a
18 summary judgment motion there, and in any event, quite frankly,
19 I can't imagine how much each of your clients are selling, but
20 I've got to imagine, unless I'm way out of line in guessing
21 about the beekeeper industry, that you're spending more on
22 legal fees than either product at issue was worth, certainly
23 during the time period of the alleged infringements.

24 So, unless you can knock out the entire case, and I
25 don't think you can on summary judgment, might be more cost

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1 effective to just go straight to trial and let's just get a
2 jury to decide all of this.

3 MR. HUDSON: Yes. I'm not one to file a questionable
4 summary judgment motion. And I'll only do it if I believe that
5 we have the facts to support it.

6 THE COURT: Okay. We'll talk about it before your
7 requirement to make it.

8 MR. MICHELEN: Judge, maybe a telephone conference
9 after Mr. Fischer's deposition.

10 THE COURT: I think we're going to have one or more
11 conferences. Let me set some more triggers.

12 By February 17 you'll write to me and Judge Engelmayer
13 as to whether you intend to move for summary judgment or not.
14 If there is no summary judgment motion, the pretrial order will
15 be due Friday, March 3. If the Court allows a summary judgment
16 motion, it will be due March 3. If the Court allows the
17 summary judgment motion, the pretrial order is automatically
18 postponed until 30 days after the Court, whether that's me or
19 Judge Engelmayer, I guess in the first instance it's me under
20 the division we have here. So 30 days after I ruled on the
21 summary judgment motion, even if there were going to be an
22 appeal to Judge Engelmayer, the pretrial order is due.

23 Settlement. Have there been any discussions? Is
24 settlement possible? What is it that you think we should be
25 doing in connection with that, and if you want to go -- I don't

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1 want any numbers, I just want are you able, etc. If you want
2 to go off the record for that, let me know and we'll go off the
3 record.

4 MR. MICHELEN: I think we can do it on the record. I
5 think that I've always amenable to a settlement conference
6 perhaps at some point after the close of the remaining parties'
7 depositions. Notwithstanding the Court's decision today, these
8 are registered copyrights, so they're statutory violations.
9 There is a number of catalogs. It's not necessarily related to
10 the amount of sales as the Court directed, but I always think
11 it would be prudent, particularly if the Court does not have a
12 summary judgment motion allowed here, for the parties to at
13 least take one stab at it. We have not discussed it in any
14 way, shape or form previously, your Honor.

15 THE COURT: Mr. Hudson?

16 MR. HUDSON: Your Honor, I'm totally in agreement with
17 settlement. As the Court may know, insurance company's
18 defending this, I'm representing Penn National Insurance, so
19 with any insurance case there is probably a chance of
20 settlement. The initial demand from the plaintiff was way out
21 there.

22 THE COURT: There is the possibility, depending on
23 what you all decide, that I will be the trial judge. If,
24 despite that, because any trial would be with a jury, if you're
25 both willing to tell me what numbers have been bandied about

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1 before so I can help think about where we're going, I'm willing
2 to hear it. If you don't want to do that, while you are
3 deciding what to do with me, or about me, I can wait.

4 MR. MICHELEN: I'd rather wait only because we didn't
5 make a demand, I frankly don't know what the plaintiff had said
6 previously.

7 THE COURT: Let me put it to you this way then. Make
8 a demand, a new demand. Defendant to answer. And then get
9 serious and do a second round. The way I usually put it is
10 often in the first round the plaintiff asks for three times the
11 gross national product, and the defendant, if they weren't from
12 North Carolina and were local, would offer a \$10 MetroCard.

13 So, let's get a little more serious than that and then
14 contact me when you're ready. It is my practice to give
15 parties one and only one settlement conference, and it is
16 always also my practice to have principals in attendance. So
17 Mr. Fischer and the insurance rep and/or whoever from Brushy
18 Mountain also has a say in settlement. It's got to be in
19 person. I don't care where the insurance rep is, settlement
20 conferences only work when everyone is here.

21 So think about that. I am not going to stop any of
22 the deadlines for that purpose, so you will very to work it in.
23 And the sooner you get time on my calendar, the more likely it
24 is you'll get time that works for your schedule. Generally I
25 give two hours to half a day for a settlement conference.

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1 MR. HUDSON: To that point, your Honor, I think -- and
2 Mr. Michelen and I can deal with our talking about settlement,
3 and then who do we contact to get on your calendar for
4 settlement conference?

5 THE COURT: Jointly call my secretary.

6 MR. HUDSON: Okay.

7 THE COURT: Both of you have lots of dates from
8 yourself and your clients, and we'll see what then is available
9 on my calendar.

10 MR. HUDSON: Okay, sure thing. I'd like to get that
11 scheduled sooner rather than later.

12 THE COURT: All right. But, I agree with that on the
13 other hand, if the plaintiff's number is outrageously high,
14 and/or the defendant's number is outrageously low, I'm not a
15 miracle worker. I have a very healthy ego, but you guys got to
16 think about the worth of this case, whether it's statutory
17 damages or anything else, and act accordingly. In the
18 meantime, do you want a status conference?

19 MR. MICHELEN: Yes, your Honor.

20 THE COURT: When?

21 MR. MICHELEN: I would think, well, if the letter is
22 not written until 2/17 we can't have a conference before that.

23 THE COURT: The only purpose for a status conference
24 before February 15 is if you're having any discovery related
25 problems. If you think you're going to muddle through to the

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1 end working collegially and cooperatively, we can leave it that
2 with respect to that, that you will contact me by letter on ECF
3 if there are any problems, and then I'll set up a conference
4 either on the phone or in person almost immediately after I get
5 such a letter.

6 MR. MICHELEN: In that case, your Honor, I don't think
7 we need one because we're supposed to write by 2/17 if there is
8 a request for summary judgment, and then 3/3 is either the
9 motion or the joint pretrial order. And then we're also still
10 going to have an attempt to resolve the matter, so I don't
11 think that a status conference is necessary.

12 THE COURT: All right.

13 MR. HUDSON: That's fine, your Honor.

14 THE COURT: We'll leave it that you will contact me if
15 there are any problems or contact me either via ECF or by
16 calling my secretary for the settlement conference.

17 How soon can you all collectively get back to me on
18 the 636(c) issue, that is the consent to have the case in front
19 of me for all purposes?

20 MR. MICHELEN: Monday is a holiday but certainly by
21 Wednesday or Thursday.

22 MR. HUDSON: Your Honor, the named defendants are very
23 easy to get in touch with. It is the insurance adjustor that's
24 a little tougher.

25 THE COURT: I'm not sure whether this is a lawyer's

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1 call or a client's call, but why don't we leave it this way.
2 By January 20, you will jointly write to me saying either there
3 is consent, here's the form. Option two, there is consent but
4 only after Judge Engelmayer reviews my decision on the motion
5 to dismiss. Or two, there is no consent, thank you very much,
6 but no thanks. Or option three, I'm still waiting to hear from
7 the insurance adjustor.

8 In that letter, whoever writes it on behalf of both
9 parties, it should not disclose that party A says yes, party B
10 says no.

11 MR. MICHELEN: Of course.

12 THE COURT: The rules say you're not supposed to tell
13 me that. Frankly, I don't care. But that's what the rules
14 say.

15 Usual -- well, you don't know my usual, so let me
16 rephrase that. I'm going to require both parties to purchase
17 the transcript which gets you a 50-50 split so that it's of
18 record. And as I say, the opinion will come out today or early
19 next week, depending on when I put the finishing touches on it.
20 All right.

21 MR. HUDSON: Thank you, your Honor.

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